93-868

No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

STATE OF IDAHO,

Petitioner,

vs.

JACKIE CARL CURL and KIMBERLY J. McCURDY,

Respondents.

Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

If an officer has probable cause to believe that evidence of criminal activity is present within a dwelling, and a reasonable belief that the evidence is about to be destroyed, does the Fourth Amendment require the officer to make an independent determination that the crime he is investigating is a "violent crime" before the officer is justified in entering without a warrant in order to stop the destruction?

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OPINION BELOW

The opinion of the Idaho Supreme Court has not yet been reported. It is set forth in Appendix A.

JURISDICTION

The opinion of the Idaho Supreme Court was issued on September 1, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). While respondents cited both the Idaho and United States Constitutions in their suppression motions, the Idaho Supreme Court framed the issue on appeal as "whether [the officer's] warrantless entry into a private residence violated the Fourth Amendment of the United States Constitution." *State v. Curl*, Nos. 19499/19538, slip op. at 3 (Idaho September 1, 1993). Therefore, the judgment of the court below is not based on an independent and adequate state ground. *See, Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Idaho Code § 37-2705 provides in pertinent part:

> Schedule I. – (a) The controlled substances listed in this section are included in schedule I.
>
> . . . .
>
> (d) Hallucinogenic substances. Any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances . . .
>
> (14) Marihuana;

Idaho Code § 37-2732, at the time of the events giving rise to this case, provided in pertinent part:

> Prohibited acts A – Penalties.
>
> . . . .
>
> (c) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter.
>
> . . . .
>
> (3) Any person who violates this subsection and has in his possession a controlled substance which is a nonnarcotic drug classified in schedule I . . . is guilty of a misdemeanor and upon conviction thereof may be imprisoned for not more than one (1) year, or fined not more than one thousand dollars ($1,000), or both.
>
> . . . .
>
> (e) If any person is found to possess marijuana, which for the purposes of this subsection

> shall be restricted to all parts of the plants of the genus Cannabis, including the extract or any preparation of cannabis which contains tetrahydrocannabinal, in an amount greater than three (3) ounces net weight, it shall be a felony and upon conviction may be imprisoned for not more than five (5) years, or fined not more than ten thousand dollars ($10,000), or both.

STATEMENT OF THE CASE

On the evening of February 3, 1990, Officer Gerald Evensizer of the Coeur d'Alene, Idaho, police department entered an apartment building and went to the second floor to serve an arrest warrant. (Tr., p.8, L.21 - p.9, L.23.) (Neither of the respondents was the person named in the warrant.) The officer saw a man step out of one of the apartments; he later identified the man as Jackie Carl Curl. As Curl exited the apartment, Officer Evensizer noticed a "whitish cloud of smoke" emanating from the apartment. A short time later the officer recognized the smell of "freshly burning marijuana." The smell had not been present before Curl opened the apartment door. (Tr., p.11, L.12 - p.13, L.23.) Officer Evensizer, who had ten years of police experience, had attended training courses in which marijuana had been burned for demonstration purposes. He estimated that he had smelled burning marijuana in the course of his duties "easily" more than 100 times. (Tr., p.3, L.8 - p.8, L.20.)

Curl walked down the hall toward Officer Evensizer at a "brisk" pace while "looking backward slightly."

When he came to within ten feet he noticed the uniformed officer standing at the top of the stairs. Curl stopped abruptly and looked "very surprised." He turned and sprinted back to the apartment. (Tr., p.11, L.12 - p.12, L.10; p.14, Ls.12-20; p.29, Ls.23-25.) Officer Evensizer gave chase. (Tr., p.15, Ls.4-5.) As Curl reentered the apartment and tried to close the door behind him, Officer Evensizer heard him warning the people inside "that the police were there." The officer caught the door as it hit the door frame. He stood to the side of the door, paused for a moment, then pushed the door open and entered the apartment. Several people were inside, including Curl and Kimberly McCurdy. (Tr., p.17, Ls.16-25; p.20, Ls.2-22.)

Officer Evensizer later testified that when Curl reentered the apartment and spoke to the persons inside, he thought, based on his training and experience, "[t]hat there was going to be the destruction of the evidence, the burning of marijuana and possibly the escape of the suspects inside." (Tr., p.18, Ls.4-13.) "One thing that we have been trained and is consistent is that it is very typical to try to destroy the evidence, either by throwing it out, flushing it or eating it." (Tr., p.18, Ls.21-24.) He did not seek a search warrant before entering "[b]ecause I felt that by the time we pooled our resources and requested that, the evidence would have been destroyed." (Tr., p.19, L.23 - p.20, L.1.)

Curl and McCurdy were charged with the misdemeanors of possession of less than three ounces of marijuana and possession of drug paraphernalia. (Curl R., pp.1-2; McCurdy R., pp.1-2.) Both defendants filed motions to suppress evidence. Curl's motion asserted that "the entry was warrantless, and in violation of the Idaho

Constitution (Article 1, Section 17) and the U.S. Constitution (Fourth and Fourteenth Amendments)." (Curl R., p.6.) McCurdy's motion stated that "the warrantless entry into defendant's home was illegal in violation of United States Constitution and the Idaho Constitution, Article 1 Section 17." (McCurdy R., p.6.) Neither motion challenged any aspect of the officer's actions other than the entry of the apartment. Curl's and McCurdy's motions are set forth as Appendices D and E respectively.

At the suppression hearing, the magistrate expressed some question as to whether an officer could make a warrantless entry to prevent the destruction of evidence where the underlying offense was a misdemeanor. He stated that, in his view, "the balance of what was necessary to establish exigent circumstances has been established." (Tr., p.44, L.19 - p.45, L.18.) He later issued a written decision suppressing the evidence; he held that a warrantless entry to prevent the destruction of evidence was not valid where the underlying offense was a misdemeanor. (Curl R., pp.15-18; McCurdy R., pp.15-18.) That decision is set forth as Appendix C. On appeal, the district judge affirmed the suppression order on the same basis. (Curl R., pp.26-39; McCurdy R., pp.32-44.) The opinion of the district judge is set forth as Appendix B.

The Idaho Supreme Court also affirmed the suppression order, but on a different basis. *State v. Curl*, Nos. 19499/19538, slip op. (Idaho September 1, 1993). The court rejected the use of a felony/misdemeanor distinction in determining the validity of warrantless entries to prevent destruction of evidence. The court noted:

> It is often difficult for an officer to determine whether the underlying offense is a felony or misdemeanor. For instance, in the case *sub judice*, had Curl and McCurdy possessed more than three ounces of marijuana, this possession would have amounted to a felony. Moreover, while it is perfectly within the legislature's right to determine at what point an offense becomes a felony, drawing a distinction between three and four ounces does not make much sense when it comes to determining whether sufficient exigency exists.

State v. Curl, slip op. at 5.

The court went on to hold that a warrantless entry to prevent the destruction of evidence is valid only where the underlying crime is a "violent offense." Since Officer Evensizer suspected Curl of a controlled substance offense, the court held his entry of the apartment to be invalid. The court purported to derive this result from the opinions in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and *McDonald v. United States*, 335 U.S. 451 (1948). *State v. Curl*, slip op. at 5-6. The court concluded, "The crime of which Evensizer suspected Curl – marijuana possession – while indubitably a crime in this state, is not a violent offense. . . . [W]hen the only concern is destruction of evidence, the offense must be sufficiently grave, *i.e.*, a violent offense, be it misdemeanor or felony." *Id.* at 6-7.

REASONS FOR GRANTING THE WRIT

This case concerns an important unresolved area of Fourth Amendment law: Under what circumstances may

an officer make a warrantless entry of a dwelling or other premises to prevent the destruction or removal of evidence or contraband? In particular, this case reflects the need for the Supreme Court to address a question that has created considerable conflict in the courts below: What limitations, if any, are there on the nature of the crime under investigation that will justify a warrantless entry to prevent the destruction of evidence? In particular, is such a warrantless entry justified only in the case of a violent crime?

The Need For A Clear Standard

The questionable result reached by the court below in this case demonstrates the need for a clarification of the holding in *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In that case, the Court held that police acted improperly when they entered a home to make a warrantless arrest for a civil, nonjailable traffic offense. The opinion of the Idaho Supreme Court interprets this holding to restrict warrantless entries to prevent the destruction of evidence to situations where the police are investigating a "violent offense." *State v. Curl*, slip op. at 5-7. While this term is not defined in the opinion, it clearly excludes many, if not most, felony offenses. Under this holding, even where the police are certain that persons within a dwelling are flushing away or otherwise destroying large quantities of cocaine or heroin, or evidence of racketeering, theft, burglary or other similar crimes, they would be powerless to enter the dwelling to stop the destruction until they had obtained a search warrant. By then, of course, the entry and search might well be futile.

This approach appears to be the direct result of the *Welsh* Court's holding that "an important factor to be considered when determining whether an exigency exists is the gravity of the underlying offense." *Welsh, supra,* at 753. In essence, *Welsh* left it to the lower courts to determine what are "minor offenses" – exceedingly vague guidance, and in apparent conflict with *Roaden v. Kentucky,* 413 U.S. 496, 505 (1973) ("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation.").

The Conflict In The Lower Courts

The question implicated by this case is whether the Fourth Amendment restricts warrantless entries to prevent destruction or removal of evidence to *any* particular class of crimes. With regard to this broad issue, there is a wide division in the lower courts.

Many courts place no restriction on the class of crimes under investigation that may trigger a warrantless entry to prevent destruction of evidence. The most frequently relied-upon case in this area is *United States v. Rubin,* 474 F.2d 262 (3rd Cir.), *cert. denied,* 414 U.S. 833 (1973). There the Third Circuit set forth the following as circumstances that would be relevant in determining the validity of such an entry: (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to officers

guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic. 474 F.2d at 268-69. The court adopted no distinctions – whether felony/misdemeanor, or violent/nonviolent – as to the particular crime under investigation.

But other courts have cited the seriousness of the offense under investigation as a factor to be considered. Most notably, the Tenth Circuit has stated that a warrantless entry of a home to prevent the destruction of evidence is "available only for serious crimes. . . . " *United States v. Aquino*, 836 F.2d 1268, 1272 (10th Cir. 1988). The Tenth Circuit apparently has not undertaken to define "serious crimes" in this context, beyond indicating that the crime is "serious" when "the state interest in preventing the crime (as determined by the penalty imposed for violations) is sufficiently great." *Id.* at 1271. Five other circuits have indicated that the "gravity of the underlying offense" is a factor to be considered in evaluating the validity of a warrantless entry to prevent destruction of evidence. *See, United States v. Kane*, 887 F.2d 568, 574 (5th Cir. 1989), *cert. denied*, 493 U.S. 1090 (1990); *United States v. George*, 883 F.2d 1407, 1413, n.3 (9th Cir. 1989); *United States v. Clement*, 854 F.2d 1116, 1120 (8th Cir. 1988); *United States v. Socey*, 846 F.2d 1439, 1444 (D.C. Cir.), *cert. denied*, 488 U.S. 858 (1988); *United States v. Baldacchino*, 762 F.2d 170, 176 (1st Cir. 1985). None of these cases has

indicated precisely when a crime would become sufficiently grave to justify a warrantless entry to prevent destruction of evidence; the concept of "gravity" remains nebulous.

At least one state court appears to approve such entries only in felony cases. *State v. Ramirez*, 746 P.2d 344 (Wash. App. 1987). It was the *Ramirez* case that the magistrate and district judge in the present case relied upon in adopting a felony/misdemeanor distinction. (Curl R., pp.17-18, 34-35.) *See also, State v. Hert*, 370 N.W.2d 166 (Neb. 1985) (requiring "serious offense" for warrantless entry); Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations – Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. Kan. L. Rev. 439 (1990) (advocating felony/misdemeanor distinction in evaluating warrantless entries).

The Source Of The Conflict

The source of the conflict and confusion in this area is the absence of a clear standard from the Supreme Court. The Court has given repeated indications that warrantless entries to prevent destruction of evidence are permitted, at least in some circumstances. *See, Vasquez v. United States*, 454 U.S. 975, 988 (1981) (Brennan, J., dissenting from denial of certiorari; indicating that warrantless entry of home is permissible where there is probable cause to search, and a reasonable belief, based on articulable facts, that the destruction of evidence is imminent); *Segura v. United States*, 468 U.S. 796, 810 (1984) ("We hold . . . that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence

while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents.") (Opinion for the Court by Burger, C.J.; portion of opinion concurred in only by O'Connor, J.); *United States v. Santana*, 427 U.S. 38, 43 (1976) (warrantless arrest in house of person seen engaging in drug transaction in doorway proper because, *inter alia*, there was "a realistic expectation that any delay would result in destruction of evidence"); *United States v. United States District Court*, 407 U.S. 297, 318 (1972) (indicating warrant requirement not applied where officers act to prevent destruction of evidence); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970) (warrantless search not justified because, *inter alia*, "goods ultimately seized were not in the process of destruction"); *United States v. Jeffers*, 342 U.S. 48, 52 (1951) (entry and search of hotel room not proper where there "was no question of . . . imminent destruction, removal, or concealment of the property intended to be seized"); *McDonald v. United States*, 335 U.S. 451, 455 (1948) (entry of room in rooming house not valid where evidence was not "in the process of destruction nor . . . likely to be destroyed"); *Johnson v. United States*, 333 U.S. 10, 15 (1948) (entry of hotel room invalid where "[n]o evidence or contraband was threatened with removal or destruction"); *see also, Schmerber v. California*, 384 U.S. 757 (1966) (taking of blood sample from person suspected of driving under the influence was valid, since delay necessary to obtain a warrant threatened destruction of the evidence). But the Court has never clearly articulated the standards that must be met to justify such an entry. In the absence of such clear guidance, certain of the Court's opinions have given rise to confusion.

Foremost among the cases causing problems in this area is *Welsh v. Wisconsin, supra,* a case heavily relied upon by the Idaho Supreme Court here. Welsh apparently had swerved his car off the road and walked away from the scene. The police later entered his home without a warrant and arrested him for driving under the influence. A first time DUI in Wisconsin at that time was a noncriminal violation punishable only by a fine. The issue as stated by the Court was "whether, and if so under what circumstances, the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest for a nonjailable traffic offense." 466 U.S. at 742. The Court concluded that the entry was unreasonable, holding that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." *Id.* at 753. The Court noted that the "only potential emergency claimed by the State was the need to ascertain the petitioner's blood-alcohol level." *Id.* at 753. But this justification was rejected because Wisconsin had "chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible." *Id.* at 754.

Similarly, the concurring opinion of Justice Jackson in *McDonald v. United States, supra,* quoted in *Welsh,* lent confusion to this area. Justice Jackson observed:

> Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to

> reach it. . . . While I should be human enough to apply the letter of the law with some indulgence to officers acting *to deal with threats or crimes of violence which endanger life or security*, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime. . . . When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

McDonald v. United States, 335 U.S. at 459-60 (Jackson, J., concurring) (emphasis added).

The state submits that because Supreme Court cases do not provide clear guidance, the confusion of the lower courts is inevitable. Cases such as *Welsh* and *McDonald* have left room for some courts to conclude that warrantless entries to prevent the destruction of evidence are limited to a particular category of crimes. *See, United States v. George*, 883 F.2d at 1413, n.3; *United States v. Aquino*, 836 F.2d at 1271-72; *United States v. Baldacchino*, 762 F.2d at 176-77; *State v. Ramirez*, 746 P.2d at 346-47. Further, as noted above, these courts are in disagreement as to the category of crimes that permit such entries.

The outcome of this confusion is apparent here. Under the decision of the Idaho Supreme Court, police officers in Idaho, unlike their brother and sister officers in other jurisdictions, will not be able to make warrantless entries to prevent the destruction of controlled substances,[1] and evidence of most felonies, no matter how

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[1] Warrantless entries to prevent the destruction of evidence in drug cases, upon a proper showing of exigency, have been

certain they may be that such destruction is taking place. This is a particularly disturbing result in view of the seriousness with which the people of Idaho view controlled substance offenses. *See*, Idaho Code § 37-2732(a)(1)(A) (making the manufacture, delivery, or possession with intent to deliver of certain controlled substances punishable by up to life in prison). The guidance of the United States Supreme Court is necessary to reverse this intolerable result, and to resolve the confusion in the lower courts.

The uncertainty and conflicts in this area cry out for resolution by the Supreme Court. The observations of one commentator five years ago, in discussing the general

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permitted in federal cases. *See, United States v. Parra*, 2 F.3d 1058 (10th Cir. 1993); *United States v. Gonzalez*, 967 F.2d 1032 (5th Cir. 1992); *United States v. Acosta*, 965 F.2d 1248 (3rd Cir. 1992); *United States v. Atherton*, 936 F.2d 728 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1187, 117 L.Ed.2d 429 (1992); *United States v. Grissett*, 925 F.2d 776 (4th Cir.), *cert. denied*, 111 S.Ct. 2245, 114 L.Ed.2d 486 (1991); *United States v. Tobin*, 923 F.2d 1506 (11th Cir.), *cert. denied*, 112 S.Ct. 299, 116 L.Ed.2d 243 (1991); *United States v. Halliman*, 923 F.2d 873 (D.C. Cir. 1991); *United States v. Schaper*, 903 F.2d 728 (2d Cir. 1990); *United States v. Munoz*, 894 F.2d 292 (8th Cir.), *cert. denied*, 495 U.S. 909 (1990); *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988); *United States v. Aquino*, 836 F.2d 1268 (10th Cir. 1988); *United States v. Rivera*, 825 F.2d 152 (7th Cir.), *cert. denied*, 484 U.S. 979 (1987); *United States v. Moore*, 790 F.2d 13 (1st Cir. 1986); *United States v. Hicks*, 752 F.2d 379 (9th Cir. 1985); *United States v. Kunkler*, 679 F.2d 187 (9th Cir. 1982); *United States v. Rubin*, 474 F.2d 262 (3rd Cir.), *cert. denied*, 414 U.S. 833 (1973). Similarly, state courts have approved such warrantless entries in drug cases. *See, e.g., State v. Decker*, 580 P.2d 333 (Ariz. 1978); *People v. Blasius*, 459 N.W.2d 906 (Mich. 1990); *State v. Means*, 581 P.2d 406 (Mont. 1978).

absence of clear standards in this area, are even more applicable today:

> The Supreme Court has not yet provided a clear and reasoned approach to determine when a threat of destruction of evidence justifies a warrantless intrusion. The lower federal courts have provided several different approaches to the problem, with varying results in similar cases. It is undesirable for circuit courts to interpret constitutional rules differently. The federal system has but one Constitution. Different interpretations of the Constitution produce unequal treatment of citizens. Similarly situated persons should receive equal treatment under the law.
>
> Although it has been said that intercircuit conflicts are in some cases beneficial, after a certain period of time the need for certainty and uniformity outweighs whatever benefits are derived from an ongoing debate among the circuits. The circuits have struggled with this problem for more than a decade. It is time for a unified rule.

Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 Hastings L.J. 283, 324 (1988).

CONCLUSION

For the foregoing reasons, the State of Idaho prays that its petition for writ of certiorari be granted and that oral argument be scheduled.

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APPENDIX A

1993 Opinion No. 102

IN THE SUPREME COURT OF THE STATE OF IDAHO

S. Ct. Nos. 19499/19538

STATE OF IDAHO, Plaintiff-Appellant, v. JACKIE CARL CURL, Defendant-Respondent.	North Idaho, May 1993 Term Filed: September 1, 1993 Frederick C. Lyon, Clerk
STATE OF IDAHO, Plaintiff-Appellant, v. KIMBERLY J. McCURDY, Defendant-Respondent.	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. The Honorable A. H. Parisot, Jr., Magistrate; the Honorable Gary M. Haman, District Judge.

The State appeals from the magistrate's suppression of evidence arising from a warrantless entry into a residence and the district court's affirmance thereof. *Affirmed.*

Hon. Larry EchoHawk, Attorney General, and Thomas P. Watkins, Deputy Attorney General, Boise, Idaho, attorneys for appellant. Thomas P. Watkins argued.

Gregory A. Jones, Kootenai County Public Defender, Coeur d'Alene, Idaho, attorney for respondents.

BISTLINE, J.

This case requires us to determine whether the threat of destruction of evidence in connection with the offense of possession of marijuana constitutes exigent circumstances sufficient to overcome the Fourth Amendment's general prohibition against warrantless residential searches.

BACKGROUND AND PRIOR PROCEEDINGS

Officer Gerald Evensizer entered an apartment building to serve an arrest warrant on a second floor resident. He observed respondent Jackie Carl Curl exit from another apartment on the second floor, followed by a puff of white smoke emanating from the interior of the apartment. Evensizer believed that the odor coming from that apartment was that of freshly burning marijuana.

Curl walked down the hallway toward Evensizer. When Curl approached within ten feet and saw the officer, he stopped abruptly, hesitated for a moment, spun around, and ran back to the apartment from which he had left. Evensizer ran after Curl, identified himself as a police officer, paused briefly, pushed the door open, and entered the apartment. Several people were inside, including Curl and respondent Kimberly J. McCurdy. Evensizer seized certain evidence and cited Curl and McCurdy with possession of marijuana, in violation of

I.C. § 37-2732(c)(2), and possession of drug paraphernalia, in violation of I.C. § 37-2734A(1), both misdemeanors.

Curl and McCurdy filed motions to suppress all evidence obtained after Evensizer entered the apartment, contending that the entry was illegal. A hearing was held, in which Evensizer testified that he was experienced in identifying marijuana and that based upon his training and experience, he was concerned that the evidence would be destroyed if he waited to get a warrant.

The magistrate found that the threat of destruction of evidence was present but then found that in light of the fact that Curl and McCurdy were charged with misdemeanors, the State had not carried its burden of demonstrating exigent circumstances necessary to justify a warrantless residential entry.

The State of Idaho appealed the magistrate's decision to the district court, which affirmed. The State then appealed to this Court.

DISCUSSION

The issue presented on appeal is whether Evensizer's warrantless entry into a private residence violated the Fourth Amendment of the United States Constitution. More specifically, the question is whether the State sustained its burden of justifying a warrantless entry into a residence by demonstrating probable cause coupled with exigent circumstances. As discussed below, we conclude that the possibility of destruction of evidence is not sufficiently exigent when the underlying crime charged is of a

non-violent nature. We accordingly affirm the magistrate court and in turn the district court.

Any analysis of an officer's warrantless entry into a private dwelling must begin with the recognition that a warrantless entry into a private residence is presumptively prohibited by the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980); *Welsh v. Wisconsin*, 466 U.S. 740, 749, 104 S. Ct. 2091, 2097 (1984). This presumption is a strong one. *Welsh*, 466 U.S. at 749-750, 104 S. Ct. at 2097 ("[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests."). The only manner in which the government can justify such an entry is to show that the entry was based upon probable cause *and* that exigent circumstances existed necessitating immediate police action. *Payton*, 445 U.S. 573, 100 S. Ct. 1371 (1983). There can be no question that the exception does not swallow the rule – exceptions to the warrant requirement for home entries are "few in number and carefully delineated. . . . Indeed, the [United States Supreme] Court has recognized only a few such emergency conditions." *Welsh*, 466 U.S. at 750, 104 S. Ct. at 2097; *see also State v. Wren*, 115 Idaho 618, 622, 768 P.2d 1351, 1355 (Ct. App. 1989).

With the above United States Supreme Court pronouncements firmly in mind, we turn to an analysis of the State's arguments. The State contends that the magistrate court erred by relying too heavily upon the fact that the offense underlying the officer's entry and subsequent search of the room, marijuana possession, was a misdemeanor. We must thus examine the role that the severity of the underlying offense plays in determining whether

sufficient exigent circumstances exist to justify a warrantless residential entry.

There is no question but that the severity of the offense which the officer believes to be in progress, when he concludes a warrantless entry is justified, is a factor to be given considerable weight when contemplating the existence and extent of exigent circumstances.[1] In *Welsh*, the United States Supreme Court held that because the offense underlying the warrantless residential entry (there consisting of driving under the influence, then an infraction in Wisconsin) was a "relatively minor" one, the presumption of unconstitutionality was not overcome merely by the threat of destruction of evidence. The unescapable conclusion that we must draw from *Welsh* is that if an offense falls within the category of "relatively minor" offenses, 466 U.S. at 750, 104 S. Ct. at 2098, the fact that the defendant will almost certainly destroy the relevant evidence is simply not enough of an exigency to justify a warrantless entry into the home. As the *Welsh* Court declared, "When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with

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[1] We are aware, as the State points out, that reliance upon this factor has been criticized. *See, e.g., Welsh*, 466 U.S. 740, 104 S. Ct. 2091 (White, J., dissenting). Nevertheless, the *Welsh* majority opinion clearly holds that gravity is an important factor. Too, there is a certain common-sense facet to the gravity factor. Preventing someone from disposing of or hiding a murdered corpse is clearly much more of an emergency than keeping someone from flushing a few ounces of marijuana or other controlled substances down a toilet.

a warrant issued upon probable cause by a neutral and detached magistrate." 466 U.S. 750, 104 S. Ct. 2098 (footnote omitted).

The question next becomes, what constitutes a "relatively minor" offense. Both the State and the defense recognize the need for some sort of bright-line test that law enforcement officers may apply when deciding whether to enter a residence without a warrant. The *Welsh* Court somewhat suggests, but stops short of declaring, that the line should be drawn between felonies and misdemeanors or other lesser charges.[2] Moreover, several state courts appear to have applied such a distinction.[3] *See, e.g., State v. Ramirez*, 746 P.2d 344 (Wash. App. 1987) (possession of marijuana).

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[2] The majority in that case notes, in a footnote referring to the government's interest in arresting for a minor offense: "[e]ven the dissenters in Payton, although believing that warrantless home arrests are not prohibited by the Fourth Amendment, recognized the importance of the felony limitation on such arrests." *Welsh*, 466 U.S. at 750, 104 S. Ct. at 1098. The dissenters nonetheless note that "[t]his problem [the uncertainty of officers in the field] could be lessened by creating a bright-line distinction between felonies and other crimes, but the Court – wisely in my view – does not adopt such an approach." *Welsh*, 466 U.S. at 761, 104 S. Ct. 2103 (White, J., dissenting).

[3] Presently there does not appear to be a post-*Welsh* Idaho Supreme Court case that has addressed the issue of the role of the gravity of the underlying offense. In *State v. Hoak*, this Court held only that the facts did not support a reasonable belief on the part of the officers that unless they acted evidence would be destroyed. *State v. Hoak*, 107 Idaho 742, 749, 692 P.2d 1174, 1181 (1984). Thus, no analysis of *Welsh* was undertaken.

We are in accordance with the State's argument that the distinction between felonies and misdemeanors is not the desired distinction for several reasons. It is often difficult for an officer to determine whether the underlying offense is a felony or misdemeanor. For instance, in the case *sub judice,* had Curl and McCurdy possessed more than three ounces of marijuana, this possession would have amounted to a felony. Moreover, while it is perfectly within the legislature's right to determine at what point an offense becomes a felony, drawing a distinction between three and four ounces does not make much sense when it comes to determining whether sufficient exigency exists.

A more workable distinction as to the gravity of the offense factor is between violent and non-violent offenses. This distinction finds its roots in Justice Jackson's concurrence in *McDonald v. United States,* 335 U.S. 451, 459-60, 69 S. Ct. 191, 195 (1948), which was quoted with approval in *Welsh*:

> Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it. . . . It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up *offenses that involve no violence or threats of it.* While I should be human enough to apply the letter of the law with some indulgence to officers *acting to deal with threats or crimes of violence which endanger life or security,* it is notable that few of the searches found by this Court

> to be unlawful dealt with that category of crime. . . . While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures.

Welsh, 466 U.S. at 751, 104 S. Ct. at 2098 (emphasis added). And, as Judge Burnett cogently explained in *Wren*,

> In some cases the 'gravity' of the offense may be reflected in its violent or threatening nature. Violent conduct may be considered, along with other facts, in assessing a risk of imminent harm to police officers, or to others, if an arrest is delayed while awaiting a warrant. This is the meaning we ascribe to the *Welsh* court's reference to the 'gravity' of the offense.

115 Idaho at 622 n.4, 768 P.2d at 1355 n.4.

The crime of which Evensizer suspected Curl – marijuana possession – while indubitably a crime in this state, is not a violent offense. We do not thereby imply that prosecuting drug offenses is not important. Nonetheless, when the sanctity of home and security of a person is implicated by a failure to obtain a warrant, we agree with the Court of Appeals in *Wren* that "[t]he unifying question, in determining whether exigent circumstances exist, is whether the facts reveal 'a *compelling* need for official action and no time to secure a warrant.' " 115 Idaho at 624, 768 P.2d at 1357, quoting from *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 1949 (1978) (emphasis added).

This is not to say that the gravity of the underlying offense is the sole factor in determining whether exigent circumstances exist sufficient to justify a warrantless entry. If, for instance, a person is known to have committed a non-violent offense and the officer possesses a reasonable belief that other exigencies exist, for instance, that the person is armed, such would seem to amount to exigent circumstances. But when the only concern is destruction of evidence, the offense must be sufficiently grave, *i.e.*, a violent offense, be it misdemeanor or felony.

The State contends that the magistrate judge erred in considering gravity of the underlying offense as the sole criterion for dismissing the State's charges against Curl and McCurdy. Assuming, arguendo, that the State's argument contains merit where an order of a court is correct but based upon an erroneous theory, this Court will affirm upon the correct theory. *See Idaho Schools for Equal Educational Opportunity v. Evans*, ___ Idaho ___, ___, 850 P.2d 724, 731 (1993), citing *Andre v. Morrow*, 106 Idaho 455, 459, 680 P.2d 1355, 1359 (1984). As the district court noted, there was absolutely no hint in the record or in the parties' briefs of any potential exigency, apart from the threat of evidence destruction. And, as discussed above, under *Welsh* it is clear that when an offense falls within the category of "relatively minor," probable destruction of evidence in and of itself will not support a warrantless entry into the home.

Because Evensizer's warrantless entry into the apartment violated the Fourth Amendment, all fruits derived from that poisonous tree must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963). Accordingly, we affirm the magistrate court's suppression

of the evidence obtained as a result of the entry. We also affirm the district court judgment upholding the decision of the magistrate.

McDEVITT, C.J., JOHNSON, TROUT, and SILAK, JJ. concur.

APPENDIX B

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR
THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff/Appellant, vs. JACKIE CARL CURL and KIMBERLY J. McCURDY, Defendant/Respondent.	) CASE NO. CR-90-63716) CASE NO. CR-90-63680) MEMORANDUM OPINION AND ORDER IN RE: APPEAL BY STATE OF IDAHO (Filed July 23, 1991)

The State appeals from an Order entered in the Magistrate's Division suppressing the evidence obtained subsequent to a warrantless entry for a misdemeanor arrest. Affirmed as set forth herein.

Nancy Stricklin, Assistant City Attorney, City of Coeur d'Alene, for the Plaintiff/Appellant.

Timothy Gresback and Jonathan B. Hull, Deputy Public Defenders, Kootenai County, for the Defendants/Respondents.

PROCEDURAL BACKGROUND

On February 3, 1990, Officer Gerald Evensizer of the Coeur d'Alene Police Department entered an apartment without a warrant. Certain evidence was seized at that

time. The Defendants/Respondents were arrested and charged by Uniform Citation with (1) possession of less that [sic] 3 ounces of marijuana in violation of Idaho Code § 37-2732(c)(2), a misdemeanor, and (2) possession of drug paraphernalia in violation of Idaho Code § 37-2734(a)(1), a misdemeanor.

Defendants/Respondents filed a motion to suppress the evidence, which was heard on July 25, 1990 before the Honorable A. H. Parisot, Magistrate. The Magistrate found that exigent circumstances existed for the entry of the police officer into the apartment. However, the Magistrate took under advisement the issue of whether exigent circumstances applies in misdemeanor cases. Thereafter, the Magistrate issued a written opinion in which he stated the issue as follows:

> whether the warrantless entry by the officer into an apartment where he had probable cause to believe marijuana was being consumed and that if he did not take prompt action the evidence would be destroyed or removed warrants suppression.

Relying upon *Welsh v. Wisconsin*, 466 U.S. 740, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984), and *State v. Ramirez*, 49 Wash. 814, 746 P.2d 344 (1987), the Magistrate concluded that the

> Court has not found, nor has it been cited to, any case involving a misdemeanor or other crime by whatever designation below the felony level where suppression has been upheld in a situation akin to the case at bar.

The Magistrate suppressed the evidence.

The State of Idaho appealed the Decision of the Magistrate. A hearing was held on April 26, 1991. Both the Appellants and the Respondents have submitted briefs herein.

FACTUAL BACKGROUND

In the early evening hours on February 3, 1990, Officer Gerald Evensizer entered an apartment building at 315 South Third Street in Coeur d'Alene, Idaho, to serve an arrest warrant to a resident of an apartment on the second floor.[1] He observed an individual exit from another apartment on the second floor, followed by a puff of white smoke which emanated from the interior of the apartment. The police officer identified the odor coming from that apartment as what he believed to be freshly burning marijuana.

The individual, Jack Carl Curl, walked briskly down the hallway toward the officer. When Curl was approximately ten feet away, he saw the officer. Curl stopped abruptly, looked surprised, hesitated for a moment, spun around, and began to sprint back to the apartment from which he had exited. As the officer ran behind him, Curl grabbed the door handle, threw the door open, pushed the door back, and warned the others inside. Then Curl closed the door on the officer.

As the officer ran up to the door, he put his hand out and caught the door as it hit the door frame. He identified himself as an officer with the Coeur d'Alene Police

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[1] Officer Evensizer was dressed in uniform.

Department, paused briefly, shoved the door open, and entered into the apartment. Several people were inside the apartment, including Jack Carl Curl and Kimberly J. McCurdy. Certain evidence was seized and the Defendants/Respondents were arrested.

Officer Evensizer testified that he had extensive experience, both in California and in Idaho, identifying marijuana, including the odor. Officer Evensizer also testified that he entered the apartment without a search warrant because, based upon his training and experience, he believed that an offense was being committed and was concerned that the evidence would be destroyed if he waited to get a warrant.

ISSUE ON APPEAL

Does the exigent circumstances exception to the warrant requirement apply so that a law enforcement officer may enter into a private residence where the officer has reason to believe that a misdemeanor offense is being committed?

DISCUSSION

Standard of Review

In a case where there is an appeal of a ruling on a motion to suppress evidence, the proper standard of review is one of "deference to factual findings unless they are clearly erroneous, but free review of a trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found." *State v. Rusho*, 110 Idaho 556, 559, 716 P.2d 1328 (Ct. App. 1986).

In the instant case, the question on appeal is framed so that it is a matter of law as to whether constitutional requirements have been satisfied in light of the facts that were found by the Magistrate. Therefore, this Court will exercise free review of the Magistrate's decision.

The Law and Its Application to This Case

Persons have a right under the Fourth Amendment to the United States Constitution and Art. I, § 17 of the Idaho Constitution to be secure in their homes. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978). The United States Supreme Court has drawn a bright constitutional line against the warrantless arrest of a person in his or her home. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *State v. Wren*, 115 Idaho 618, 768 P.2d 1351 (Ct. App. 1989). A warrantless search or seizure is presumptively unreasonable unless it falls within certain specific and well delineated exceptions. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *State v. Woolery*, 116 Idaho 368, 775 P.2d 1210 (1989). One of the accepted exceptions to the requirement for a warrant is exigent circumstances. *Payton v. New York, supra.* The burden is upon the prosecution to show the existence of the exigent circumstances. *Welsh v. Wisconsin, supra; State v. Yeates*, 112 Idaho 377, 732 P.2d 346 (Ct. App. 1987).

The United States Supreme Court held in *Payton v. New York, supra,* that exigency was an exception to the requirement for a warrant before entry into a person's home to make an arrest. However, the *Payton* court declined to consider the scope of "exigency." The holding in *Payton* was also expressly limited to felony arrests.

In *Welsh v. Wisconsin*, *supra*, the United States Supreme Court addressed the issue of whether exigent circumstances existed. In *Welsh*, the defendant was arrested in his home, without a warrant, for driving while under the influence of alcohol, which at that time was a noncriminal violation in Wisconsin. First, the *Welsh* court emphasized that only a few specific exceptions to the warrant requirement exist and that the police bear a heavy burden when attempting to demonstrate an "urgent need" that might justify a warrantless search. According to *Welsh v. Wisconsin*, 104 S.Ct. at 2098,

> Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate *when the underlying offense* for which there is probable cause to arrest *is relatively minor*. . . . When *the government's interest is only to arrest for a minor offense*, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause. . . .

This is not a novel idea. Writing in concurrence in *McDonald v. United States*, Justice Jackson explained why a finding of exigent circumstances to justify a warrantless home entry should be severely restricted when only a *minor offense* has been committed:

> 'Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly *depends*

> *somewhat upon the gravity of the offense* thought to be in progress. . . . It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in *following up offenses that involve no violence or threats of it. . . .'*

(Emphasis added; citations omitted.)

The *Welsh* court then notes that many lower courts consider the gravity of the offense an important part of their constitutional analysis. According to *Welsh*, 104 S.Ct. at 2099, "[b]ut of those courts addressing the issue, *most* have refused to permit warrantless home arrests for nonfelonious crimes." (Emphasis added.) A number of cases are cited where the courts have limited exigent circumstances to felonious circumstances; then, the *Welsh* court compares cases to the contrary. The *Welsh* court states:

> without necessarily approving any of these particular holdings or considering every possible factual situation, we note that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is *extremely minor.*
>
> *We therefore conclude that the common-sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on 'unreasonable searches and seizures,' and hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. . . . [A]pplication of the exigent-circumstances exception in the context of a home entry should*

> *rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.* (Emphasis added.)

Welsh v. Wisconsin, 104 S.Ct. at 2099. Applying the facts to the law, the *Welsh* court found that the defendant was arrested in his home for a noncriminal, traffic offense without "hot pursuit" and with no threat to public safety; even the fact that the potential evidence of the defendant's blood-alcohol level might be destroyed did not rise to the level of exigency where the offense was minor. In footnote 11, the *Welsh* court made it clear that, while the decision in *Payton* was limited to exigent circumstances where there was an entry of a home for a felony arrest, the decision in *Welsh* was based upon the fact that there were no exigent circumstances; the *Welsh* court did not "consider whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses." *Welsh v. Wisconsin*, 104 S.Ct. at 2097.

Therefore, it appears that the United States Supreme Court has given its approval of a "common-sense approach" and has stated that the gravity of the underlying offense is a factor to be considered when determining whether an exigency exists, but has stopped short of actually deciding that a bright line must be drawn between felonies and misdemeanors.

The Idaho Supreme Court dealt with this issue in *State v. Wren*, 115 Idaho 618, 768 P.2d 1351 (Ct. App. 1989). First, the *Wren* court reviewed the United States Supreme Court cases, including *Welsh v. Wisconsin, supra*. In footnote 4, the *Wren* court stated that

> [i]t may be questioned whether the scope of Fourth Amendment protection should depend upon the severity of a potential sentence for the alleged offense. *See generally* LaFAVE at § 6.1(f). As the *Welsh* court acknowledged, the seriousness of an alleged crime does not, of itself, constitute an exigent circumstance. However, we are constrained to accept the statement in *Welsh* that 'an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.' *In some cases the 'gravity' of the offense may be reflected in its violent or threatening nature.* Violent conduct may be considered, along with other facts, in assessing a risk of imminent harm to police officers, or to others, if an arrest is delayed while awaiting a warrant. This is the meaning we ascribe to the *Welsh* court's reference to the 'gravity' of the offense. (Citations omitted; emphasis added.)

The *Wren* court noted that the term "exigent circumstances" has not been precisely defined. The factors listed in *Dorman v. United States*, 435 F.2d 385 (D.C.Cir. 1970), including the gravity of the offense, have often been used in a balancing process to determine whether exigent circumstances existed. The *Dorman* factors were adopted and applied by the Idaho Supreme Court in *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978). The *Wren* court specially approved those factors from *Dorman* which focus on the necessity of arresting without a warrant. The *Wren* court held that

> [t]he unifying question, in determining whether exigent circumstances exist, is whether the facts reveal 'a compelling need for official action and no time to secure a warrant.' A warrantless

> entry will be upheld if, but only if, there is a 'compelling need' to avoid an imminent risk of danger to life or property, destruction or loss of evidence, or escape of the suspect. The risk must especially be clear if the underlying offense is relatively minor.

State v. Wren, 115 Idaho at 624-25.

Idaho's case law, which conforms with the federal cases, requires that the gravity of the underlying offense must be considered in determining whether there is an exigent circumstance to justify a warrantless arrest inside a home. However, Idaho case law also stops short of equating a major/minor offense with the felony/misdemeanor distinction.

To see how the law set forth above is applied in a case where the facts closely resemble those in the instant matter, we turn to *State v. Ramirez*, 49 Wash.App. 814, 746 P.2d 344 (1987). In *Ramirez*, police officers, who were patrolling the building at the manager's request, smelled burning marijuana emanating from a hotel room. They knocked on the door, received an inquiry as to who was there, and replied that it was the "desk clerk" because they were afraid that the marijuana would be destroyed if they correctly identified themselves. Ramirez opened the door, but he stepped back from the door when he saw the officers. The officers then stepped inside the room. The State contended that the exigent circumstances exception to the warrant requirement applied because the officers needed to make certain that the evidence was not totally destroyed. However, according to *Ramirez*, 746 P.2d at 346,

> [t]he court in *Welsh* observed that the State's interest in making a warrantless home arrest only outweighs an individual's interest in being secure from such an invasion where serious crimes are involved. Consequently, *under normal circumstances,* where officers merely have probable cause to believe a misdemeanor is being, or has been, committed, 'application of the exigent-circumstances exception in the contest of a home entry should rarely be sanctioned. (Emphasis added.)

Rejecting the State's argument, the *Ramirez* court held that

> exigent circumstances did not exist to justify the officers' warrantless entry and arrest of Mr. Ramirez while in his hotel room. *The offenses for which the officers here had probable cause to arrest (use or possession of marijuana) were misdemeanors. Thus, using the Welsh analysis, we find the State's interest in preventing these crimes, though important, is not of sufficient magnitude to justify this warrantless entry and arrest under the Fourth Amendment.* . . . (Emphasis added.)

State v. Ramirez, 746 F.2d at 347. In footnote 5, the *Ramirez* court states that, because it concludes that exigent circumstances did not exist sufficient to justify a warrantless entry of the hotel room, it is not necessary to decide whether the greater protections afforded by the Washington Constitution would impose an absolute bar on warrantless arrests in residential premises for misdemeanors.

This Court holds that the gravity of the underlying offense is a factor to be considered when determining whether an exigency exists; that it is rare that an exigency would exist when there is only a minor offense; and that

the compelling need or the risk upon which the exigency is based must be especially clearly shown by the prosecution if the underlying offense is relatively minor. This holding is based upon case law from the United States Supreme Court, the Idaho appellate courts, and sister jurisdictions.

There is a question concerning what kind of matters are "minor offenses." According to the holding in *Welsh v. Wisconsin, supra,* the noncriminal offense of driving under the influence is minor; likewise, the Washington Court of Appeals has determined in *State v. Ramirez, supra,* that the misdemeanor offenses of use or possession of marijuana were minor. *See also Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (officers entered after they smelled burning opium emanating from a hotel room; destruction of the opium was an insufficient basis upon which to justify a warrantless entry to arrest).

Under the law above, it is clear that the gravity of the offense must be considered in determining whether an exigency exists so that an exception applies to the requirement for a warrant before there is an entry into an apartment to make an arrest. In the instant case, Officer Evensizer saw a puff of white smoke come from an apartment when the door was opened so that Curl could exit; he identified the odor of the smoke as that of freshly burning marijuana. Curl and McCurdy were charged with (1) possession of less that [sic] 3 ounces of marijuana, which is a misdemeanor under the Idaho statute, and (2) possession of drug paraphernalia, which is also a misdemeanor under the Idaho statute. There was no violent behavior and no weapons were observed; there was no evidence of danger to persons.

This Court agrees with the *Ramirez* court that these misdemeanors are minor in nature. The State has an interest in preventing these crimes, which is important and has been recognized by the Idaho State Legislature. On the other hand, an individual has a constitutional right to privacy that is of particular importance when the intrusion is into the sanctity of the home. In this case, when the State's interest in prevention of misdemeanor possession of marijuana is balanced with the rights of Curl and McCurdy to privacy in their apartment, a warrantless entry is not justified. The gravity of the offense is minor; there was no exigency in this case.

This Court holds that the offenses of possession of marijuana and possession of paraphernalia in the instant case are minor offenses and that there were no exigent circumstances justifying an intrusion into the apartment for a warrantless arrest.

Since this Court has found that the offense here is minor and that no exigency existed, it is unnecessary to decide whether all entries for warrantless arrests for misdemeanors are barred. It may be, however, that there are circumstances where the risk is sufficient, as clearly shown by the prosecution, to justify entry without a warrant.

In *State v. Wren, supra,* the Idaho Court of Appeals set forth three factors that might be considered in determining whether there are exigent circumstances: (1) to avoid an imminent risk of danger to life or property, (2) to prevent destruction or loss of evidence, and (3) to avoid an escape of the suspect. In the instant case, the State has not argued that there was a risk of danger or violence and

the State has not argued that there was "hot pursuit." Instead, the State has argued that there was a compelling need to enter the apartment and make the warrantless arrest because the evidence, *i.e.*, the marijuana, would be destroyed.

If the offense here had not been minor, the prosecution would still have had to show that there were exigent circumstances based upon the possible destruction of evidence before a warrantless entry into the home could be made. Guidance is found in *State v. Yeates*, 112 Idaho 377, 732 P.2d 346 (Ct. App. 1987) (defendant charged with one count of delivery of a controlled substance and one count of possession of a controlled substance with intent to deliver). The *Yeates* court states as follows:

> The state has the burden to show the existence of the exigent circumstances justifying a warrantless entry. *United States v. Cuaron, supra. Cuaron*, like *Hoak* [an Idaho case], used a reasonable belief standard for determining when the possible destruction of evidence justifies warrantless action. In *Cuaron*, the court added that '[b]y "reason to believe" we mean just that: *reason to believe.* Mere guesswork or whim will not do.' 'When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it be pointing to some real, immediate and serious consequences if he postponed action to get a warrant.' (Citations omitted.)

State v. Yeates, 112 Idaho at 381. In *Yeates*, the state failed to show that the warrantless entry was imperative because of the destruction of evidence.

Because this case has been decided on other grounds, it is not necessary to make a determination here as to

whether the record reveals that the State has set forth sufficient evidence to meet its burden of showing that there were exigent circumstances because of the possible destruction of evidence. Nonetheless, the guidance from *Yeates* has been included here for future assistance when the State relies upon the exigent circumstances exception, based upon possible destruction of evidence, to the requirement for a warrant.

There is one further matter that must be discussed. The Defendants here have raised the issue of probable cause to arrest. This Court has discussed the matter above as if probable cause existed, but without specifically so deciding, so that the question presented could be addressed.

CONCLUSION AND ORDER

Based upon the foregoing discussion, it is ORDERED that the Order of the Magistrate Suppressing the Evidence be and is hereby affirmed.

DATED this 18th day of July, 1991.

/s/ Gary M. Haman
Gary M. Haman
District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

MAGISTRATE DIVISION

STATE OF IDAHO, PLAINTIFF, VS. JACKIE CURL, DEFENDANT,	CASE NO. CR 90 63716 DECISION (Filed 9/24/90)

The Defendant is charged with possession of marijuana less than 3 oz. The issue is whether the warrantless entry by the officer into an apartment where he had probable cause to believe marijuana was being consumed and that if he did not take prompt action the evidence would be destroyed or removed warrants suppression. The Court has reviewed the memoranda submitted by State and Defendant.

In Welsh vs. Wisconsin 466 U.S. 740, 80 L.Ed. 2d 732, 104 S.Ct. 2091 (1984) (opinion authored by Justice Brennan) the Court was considering a matter where warrantless entry had been made in a residence. The Court discussed at length the rationale from other cases which permitted warrantless entry with exigent circumstances in *Felony* cases and somewhat rhetorically questioned whether such searches or seizures (or both) were always unreasonable under the Fourth Amendment. In **Welsh** the

Defendant was arrested in his home, without a warrant, for driving while under the influence of alcohol which at that time in Wisconsin was a noncriminal violation subjecting the Defendant to civil forfeiture of a maximum $200 fine; a second or subsequent offense within 5 years was a potential misdemeanor with a punishment up to one year in jail and a $500 fine. The Supreme Court of Wisconsin had found in the Welsh case " . . . three factors that it believed constituted exigent circumstances: the need for 'hot pursuit of a suspect, the need to prevent physical harm to the offender and the public, and the need to prevent destruction of evidence . . . ' "

The Supreme Court after it's discussion of exceptions to the Fourth Amendment requirement for warrant and what constitutes exigent circumstances commented, at 2099, that:

> "(C)ourts have permitted warrantless home arrests for major felonies if identifiable exigencies, independent of the gravity of the offense, existed at the time of the arrest. . . . But of those Courts addressing the issue, most have refused to permit warrantless home arrest for nonfelonious crimes." (citations omitted)

The Court went on to say:

> "We . . . hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed . . . application of the exigent – circumstances exception in the context of a home entry should

> rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed."

The result of the Court's considering in **Welsh** was two-fold. The arest flowing from the unlawful entry into the residence to be prohibited under the Fourth Amendment in the circumstances of that case.

Counsel have discussed, and provided a copy of, the Washington case **State vs. Ramirez**, 49 Wash. 814, 746 P2d 344 (1987) wherein the Washington Court was dealing with a marijuana offense involving circumstances which are remarkably similar to the case before the Court here. The factual statements from **Ramirez** included the following:

> "Two Yakima police officers . . . had received information from the hotel manager that narcotics trafficing [sic] was occurring within the building and had been asked to patrol the building. . . . The officers, pursuant to the request, were on the third floor of the building when they smelled the strong odor of burning marijuana. Both officers recognized that smell from past police experience, as well as from their formal training. . . . The officers knocked on the door (from which the smoke was emanating) several times, finally receiving a query asking 'who was there?' Officer Platt responded, 'the desk clerk,' because he was afraid the marijuana would be destroyed if he identified himself as a police officer. The officer testified he heard an object being moved prior to opening the door. Thereafter, Mr. Ramirez opened the door. . . . The officers stepped inside the room without

> first requesting permission or receiving an invitation. . . . "

After the entry of the officers Ramirez produced marijuana cigarettes which gave rise to the proceedings in that matter. The Court in **Ramirez**, at 347, discussed the **Welsh** holding including that " . . . despite the fact certain destruction of evidence would occur (i.e., the Defendant's blood alcohol level would dissipate while the police obtained a warrant. Because that crime, an infraction under Wisconsin law, was relatively minor, the State's interest does not justify such an entry. . . . " the Court in **Ramirez** went on to say:

> "In the instant case, we likewise hold exigent circumstances did not exist to justify the officers' warrantless entry and arrest of Mr. Ramirez while in his hotel room. The offenses for which the officers here had probable cause to arrest (use or possion [sic] of marijuana) were misdemeanors. Thus, using the Welsh analysis, we find the State's interest in preventing these crimes, though important, not of sufficient magnitude to justify this warrantless entry and arrest under the Fourth Amendment. . . . "

The Court has not found, nor has it been cited to, any case involving a misdemeanor or other crime by whatever designation below the felony level where suppression has been upheld in a situation akin to the case at bar.

The State here argues that despite the fact that possession of marijuana is a misdemeanor the State of Idaho holds it in high esteem by reason of the penalty which can be imposed (one year and $1,000), thus distinguishing it from **Ramirez** and **Welsh**.

Considering **Welsh** and **Ramirez** in the present factual situation, it appears suppression is dictated and is so ordered.

Dated this 24th day of September, 1990.

/s/ A. H. Parisot
A. H. PARISOT, JR.
Magistrate #201

I hereby certify that I mailed true and correct copies of the foregoing, DECISION, by placing in the courthouse mailing system this 24th day of September directed to:

Nancy Stricklin	Timothy Gresback
Deputy City Attorney	Deputy Public Defender

SHIRLEY A. DEITZ, CLERK OF THE DISTRICT COURT

by /s/ Melody C. Riggs Melody C. Riggs, Deputy

APPENDIX D

OFFICE OF KOOTENAI COUNTY
PUBLIC DEFENDER
500 GOVERNMENT WAY
SUIT [sic] 400
COEUR D' ALENE, IDAHO 83814

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff, V. JACK CURL, Defendant.	CASE NUMBER CR-90-63716 MOTION TO SUPPRESS (Filed June 6, 1990)

COMES NOW the above named defendant by and through his/her attorney of record, GREGORY A. JONES, PUBLIC DEFENDER, and hereby moves the court for an order suppressing all evidence obtained by police officers in this matter subsequent to their entry into the residence located at 105 south third street, apartment L, Coeur d'Alene. This motion is based upon the fact that the entry was warrantless, and in violation of the Idaho Constitution (Article 1, Section 17) and the U.S. Constitution (Fourth and Fourteenth Amendments).

Counsel request that this matter be set for hearing at which oral argument and testimony may be presented.

DATED this 5th day of June, 1990.

/s/ Gregory A. Jones
GREGORY A. JONES
PUBLIC DEFENDER

APPENDIX E

GREGORY A. JONES
PROSECUTOR OF KOOTENAI COUNTY
OFFICE OF PUBLIC DEFENDER
500 GOVERNMENT WAY
SUIT [illegible] 400
COEUR D' ALENE, IDAHO 83814

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, Plaintiff, V. KIM MCCURDY, Defendant.	CASE NUMBER CR-90-63680 MOTION TO SUPPRESS EVIDENCE (Filed May 30, 1990)

COMES NOW the above named defendant by and through her attorney of record, JONATHAN B. HULL, DEPUTY PUBLIC DEFENDER, and hereby moves to suppress all evidence obtained by Coeur d' Alene Police Department on February 3, 1990. This motion is based on the grounds that the warrantless entry into defendant's home was illegal in violation of United States Constitution and the Idaho Constitution, Article 1 Section 17.

Defense counsel requests this motion be set for hearing in order to present oral argument and/or testimony in support of the foregoing motion.

DATED this 29th day of May, 1990.

/s/ Jonathan B. Hull
JONATHAN B. HULL
DEPUTY PUBLIC DEFENDER

APPENDIX F

[p. 1] THE COURT: We have two cases 63680 is the State versus Kimberly Jane McCurdy and 63716 is Jacky Carl Curl. The defendant McCurdy is represented by Mr. Hull, the defendant Curl is represented by Mr. Gresback. The State's represented by Nancy Stricklin.

Are there any preliminary matters.

MR. HULL: I'd be moving to exclude witness, your Honor.

THE COURT: All right. Who's your first witness?

MISS STRICKLIN: Jerry Evensizer.

THE COURT: I'll exclude your other witness. Remain available subject to being called if your [sic] needed. All right. Nothing else? Okay.

MR. HULL: No, not from me.

MISS STRICKLIN: Your Honor, I would just ask for clarification. It does appear to me by the motion we're only challenging the entry into the apartment (inaudible) . . . is that correct?

THE COURT: That's the way I would read it. Anything beyond that?

MR. GRESBACK: No, Judge.

MR. HULL: No, your Honor.

THE COURT: All right. Do you have any witnesses who are going to testify?

[p. 2] MR. GRESBACK: Perhaps, none other than my client.

THE COURT: Other than your client? Okay. Mr. Hull?

MR. HULL: None other than my client, your Honor.

THE COURT: All right. Let's proceed.

MISS STRICKLIN: The State calls Jerry Evensizer.

GERALD EVENSIZER

being called to testify on behalf of the Plaintiff, being first duly sworn, testified as follows, to-wit:

MR. HULL: Your Honor, just to perhaps avoid a problem, I'd be objecting to the Officer referring to his report unless foundations laid (inaudible) . . .

THE COURT: All right. Turn it over.

DIRECT EXAMINATION

BY MISS STRICKLIN:

Q. State your full name and spell your last name for the record, please.

A. Gerald Evensizer. E-v-e-n-s-i-z-e-r.

Q. And, what is your occupation?

A. I'm a police officer with the city of Coeur d'Alene Police Department.

Q. How long have you been employed there?

[p. 3] A. A little over five years.

Q. And, have you had any other law enforcement employment prior to that?

A. Yes, I have.

Q. And, what is that?

A. I was functioning as a police officer in California for approximately five and a half years.

Q. And, was there any specialized training that you had relating to drug matters in that and, excuse me, in training and assignments relating to drug matters in your earlier employment in California?

A. Yes, there was.

Q. Would you please explain that to the Court?

A. I originally had attended a regional reserve officer training academy, a police academy. Part of the curriculum at that academy was drug enforcement and identification. This included your typical lecture activities, practical exercises in drug identification. The actual burning of marijuana in front of the class.

I also had been hired by the city of San Jose, after I finished the Reserve Academy, where I again went through the basic academy. I was, again, schooled on drug identification and enforcement. This included, but was not limited to, enforcement identification of marijuana and related paraphernalia. After being hired by San Jose, I [p. 4] also attended several advanced individualized training classes, AIT classes, which dealt with

advance techniques, new methods of use and abuse of drugs to include, but not limited to marijuana. After completing that I also was assigned for the five and a half years, work in a neighborhood and district parks patrol on the eastside of San Jose. I was specifically assigned to deal with youth gang members, predominantly latino youth gangs. In that capacity I had numerous opportunities to be involved with drug cases. A lot of the cases involved the use of marijuana and/or PCP related paraphernalia. In addition I had also attended an extension course through UCLA dealing with marijuana and PCP abuse identification and enforcement.

I was hired from San Jose to Coeur d'Alene Police Department. After being hired with Coeur d'Alene Police Department I attended the basic Police Academy in Boise, where I was, again, instructed in drug identification and enforcement and also had practical exercises, scenarios, set up, et cetera, that benefited the learning process, as it related to that topic. After completing the basic academy, I have been assigned to work the patrol division of Coeur d'Alene Police Department where I have been functioning as a patrol officer and have had over the, slightly over, five years with Coeur d'Alene, opportunities to deal, again, with drug abuse to include, but not limited [p. 5] to marijuana identification and enforcement.

Q. Officer Evensizer, besides your endless experience and training that you've testified to in which you have drug identification, including marijuana, what type of methods of identification are used and were you trained to use?

A. They trained us, basically, an all encompassing method. By that, I mean they showed us the audio visual use, by audio visual use, they showed us cultivation techniques, seeds, what the plants look like from sprouting to mature state, how they're harvested. They also had brought in actual – actual plants and actual seeds, various size plants. We were instructed on how to identify the particular type of cannabis, the cannabis sativa L, which is the control substance out of the cannabis family of plants.

We also were instructed on the different packaging methods of marijuana. How marijuana was packaged for sale, for recreational use, personal use, for storage. The different ways that marijuana is cured, used, inhaled, smoked, laced with other drugs and et cetera.

In addition to that we also had, on numerous occasions, both at the academies and then through the AIT, courses to keep us updated on the actual smell of marijuana under controlled circumstances. They did physically burn marijuana at these controlled classes and ensured that all [p. 6] the officers present were able to smell the marijuana, see it burned, see the residue and also had burned cigarettes, that way we had a method of comparing and contrasting the marijuana smoke with that of a cigarette smoke.

Q. Besides that training, prior to this incident that we're in Court for today, had you ever had the opportunity to verify that training by identifying the smell of marijuana burning?

A. Yes, on numerous occasions.

Q. Approximately how many?

A. In all honesty, that would be too numerous. Predominantly when I was working the latino youth gangs it was uncommon to run across somebody who was associated with a gang that did not have some type of a drug and most of the time they had either marijuana and/or PCP on their person. It was quite frequent that I would enter a building or come upon some of the gang members who would actively be smoking marijuana.

Q. Would you estimate that could be over a hundred times?

A. Easily.

Q. Okay. In those circumstances, when you have the opportunity to verify by some kind of chemical testing, how many of those did it test out that it was marijuana that you were smelling of the smoke?

[p. 7] MR. HULL: I would object, your Honor, of lack of foundation.

THE COURT: All right. I'd sustain the objection. At least part of the question was – required some.

MISS STRICKLIN: I lay some foundation.

Q. Officer Evensizer, on those occasions did you have the opportunity to have – find any substance as well as smell the odor?

A. Yes.

Q. And, did you have the opportunity to have those substances checked out?

A. Yes, I did.

Q. And, what did those substances turn out to be?

MR. HULL: I would object, lack of foundation.

THE COURT: Well, all right. I'm going to still sustain it.

Q. Officer Evensizer, how were those substances tested, do you know?

A. Most of the substances would have been – there would have been a presumptive field test done on the substance. All of the follow-up testing would have been done through a state approved forensic laboratory. And, they would have tested for the presence of the THC, the main [p. 8] intoxicant in the cannabis sativa.

Q. Who performed the presumptive field test?

A. That would have been a district sergeant, a supervisor.

Q. Okay. And, after those incidences [sic] did you have a way of gaining the knowledge as to the results of those tests?

A. Yes.

Q. And, how did you obtain that knowledge?

A. It would be through the documentation sent back to the department by the state forensic laboratory on the finding of the contraband or the suspected contraband that had been sent to their lab for analysis.

Q. And, approximately how many times was your suspicion confirmed by those tests?

MR. HULL: I would object, your Honor, hearsay and lack of foundation.

THE COURT: Overruled.

A. In everyone [sic] of the cases in over ten years they have all come back positive for marijuana.

Q. Were you on duty, in your capacity as a Coeur d'Alene police officer, on February 3rd, 1990?

A. Yes, I was.

Q. And, at approximately 19:21 o'clock where were you?

A. I was at the top of the stairway in an apartment [p. 9] building at 315 South Third Street in Coeur d'Alene, Kootenai County, State of Idaho.

Q. And what were you doing there?

A. I had gone to that building in the attempt of serving an outstanding arrest warrant to one of the residence [sic] at that location.

Q. Which apartment number?

A. I don't recall which apartment. It was at the extreme southwest end of the building opposite.

Q. Can you describe that apartment building?

A. It's a larger two story wooden frame, predominantly stucco building on two sides. It's in the downtown area, the corner of Third and Sherman. Underneath the apartments are businesses with basement space underneath. I believe one of them would be Glenn's, another one a deli that they opened up. It's – the building is east

of the old J. C. Penney building. Above those stores, once you ascend a stairway on the eastside [sic] of the building on the second deck of that building, would be an apartment complex and there would be multiple units up on that second story.

Q. Which floor of the building were you on at that point?

A. I was on the second floor at the landing.

Q. Could you diagram the second floor of that building, please?

[p. 10] A. Yes.

Q. And, indicate where the apartments are? Officer Evensizer, are those last markings, which you just put on the diagram, what do those indicate?

A. Those indicate just a continuation of the building –

THE COURT: They indicated what?

A. – and (inaudible) . . . The continuation –

THE COURT: Oh, the continuation of the building.

A. – of the building and the curve line prolongation.

Q. Would you indicate, on the diagram, where the apartment was that you were to, to attempt to serve the warrant, the arrest warrant?

A. It would be in this area here.

Q. And, would you please tell the Court how you entered that floor?

A. I ascended the stairway, there's a small platform, and then it's bifurcated, there are two stairways that you can ascend on either side of the hallway. For reasons of officers safety, due to the blind corner of the hallway here, I ascended the stairway, turned right and took up a position at the top of the stairs at this location which afforded me more cover in the event I was aggressed from [p. 11] this area here.

Q. What did you observe when you got to the top of that stairway?

A. Initially, I observed that there was loud music coming from an apartment which would have been in this area here. And, that drew my attention so I stepped totally to the top of the landing and had a second officer take up my position here to monitor this area of the hallway.

Q. Who was that second officer?

A. That would have been Officer Hill of the Coeur d'Alene Police Department.

Q. Okay. And, once you entered into the hallway did you observe anything?

A. Yes, I did. While I was focusing, originally focused, my attention towards the apartment on this side of the hallway. The apartment at the very end and on the eastside of the hallway here, the door opened up and a white male exited into the hallway underneath the lights. As he exited I notice that he was followed out by a slight puff of white smoke which emanated from the interior of the apartment. The smoke passed over his upper torso, up over the top of his head. The suspect had pulled the

door closed behind him. He seemed very much in a hurry as he was walking at a very brisk [sic] down the hallway walking directly towards me. He had started to head towards the apartment in [p. 12] which the loud music had been playing. This individual had been looking backwards slightly as he started to walk down the hallway. At his rapid gait, when he looked up and saw me standing in plain uniform at the top of the stairs in the hallway, he abruptly stopped mid-gait and had a very surprised look about him. At that approximate time I noticed the odor of what I believed to be freshly burning marijuana. And, that smoke had not – and that odor had not been present prior to this individual walking out of the apartment. Walking down the hallway to me.

Q. Officer Evensizer, can you identify or is that individual present in the Courtroom today that you observed coming out of that apartment?

A. Yes, he is.

Q. And, would you point him out?

A. He would be sitting next to Miss McCurdy, it would be Mr. Curl wearing dark colored pinstripe shirt with the sleeves rolled up.

Q. Would you describe where in the Courtroom he's seated?

A. He's seated directly – he's seated in a bench directly behind the defense table.

Q. Thank you. You said you recognize an odor that you identified as marijuana?

A. Yes.

[p. 13] Q. Where was that odor coming from?

A. It was emanating from this apartment. The apartment from which white male had exited.

Q. And, you identified a puff of smoke that came out of that door when he opened the door?

A. Yes, when –

MR. GRESBACK: Objection, asked and answered.

MR. HULL: Leading –

THE COURT: Sustained.

MR. HULL: – as well.

Q. The puff of smoke you referred [sic], can you describe it more fully?

A. It was a translucent white, whitish cloud of smoke that came out when the male opened up the door, entered the hallway, the smoke came out actually at a rather rapid rate as the door was pulled open rapidly. As this individual stepped out into the hallway the smoke came with him and at that point it began to dissipate around him as the door – as the door was opened and then closed again. As he began to walk down the hallway the smoke that originally, like I said, the translucent white dissipated and I no longer focused on the dissipated smoke, my attention was directed towards the person walking at a rapid gait towards me.

Q. Prior to that incident had you ever been in a situation where you had seen smoke that had looked similar [p. 14] to that smoke?

A. Yes, I have.

Q. And, had you, in those prior incidents, had an opportunity to verify what the smoke was coming from?

A. Yes, I have.

Q. And, what was the smoke coming from in those prior incidences? [sic]

A. Would have been burning materials, commonly either large quantities of cigarettes from a bar door being opened or marijuana and/or PCP smoke coming from a burning substance.

Q. Officer Evensizer, when you observed Mr. Curl in the hallway then – and he observed you then what did you do?

A. As I said, he was walking at a fast gait when he turned and actually saw that I was standing in uniform he abruptly stopped mid-gait, looked very surprise. [sic] He hesitated for a moment and he spun around and began to sprint back for the apartment, the apartment from which he had originally been observed exiting.

Q. And, what did you do at that point?

A. At that point, because my suspicions were confirmed once I had gotten the odor from the smoke as being that of freshly burned marijuana, –

MR. HULL: Objection, your Honor, he's [p. 15] speculating and he's not answering the question. He was asked what he did at that point.

THE COURT: Sustained.

Q. What did you do at that point?

A. I gave chase to the white male.

Q. And, why did you do that?

A. Because I felt there was a crime occurring in my presence.

Q. And, what crime did you think was occurring in your presence?

A. The illegal possession and consumption burning of marijuana.

Q. Why did you think that was happening at the time?

A. Because of the smoke, the distinctive odor of the smoke, of burning marijuana coupled with the person's actions.

Q. Was the odor, that you smelled, consistent with what your training experience was on the odor of marijuana?

A. Yes, there was no doubt in my mind it was marijuana.

Q. And, you said coupled with the persons actions, what actions specifically made you think that there was an offense occurring?

A. The rapid fashion that the gentlemen had exited the apartment, started walking towards me, his – the expressive nature, his body language indicated somebody [p. 16] who –

MR. HULL: I would object, your Honor, unless the foundations laid on this body language business.

THE COURT: On what?

MR. HULL: On this body language business.

THE COURT: Oh.

MR. HULL: If he's going to testify what that supposedly means.

THE COURT: I'm not sure what the body language he's talking about. I'd sustain that objection.

MISS STRICKLIN: You're objecting just to that portion of testimony in regards to body language?

THE COURT: The objection is that it's in his body language. That's what I'm sustaining.

Q. Okay. Would you continue, as to what things you took into account making that determination?

A. When the person exited the apartment he was walking at a brisk pace –

MR. GRESBACK: Objection, asked and answered.

THE COURT: Overruled.

A. As he was walking down the hallway he appeared very relaxed, he was not tight, very fluid movements as he was briskly. Once he observed me, as I say, he abruptly stopped, appeared very surprised. He noticeably tensed, paused for a moment, spun around and then began to sprint [p. 17] back towards the apartment. That would not be consistent, based on my training and experience, if someone did not – was not knowingly engaged in illegal activity –

MR. HULL: I would object, your Honor, lack of foundation, speculation.

THE COURT: I did – he dropped off on the end, I didn't hear what the last couple of words he said were anyway, but I would sustain the objection. It sounded like he was talking something based on his training and experience and I'm not sure what aspect of training and experience he's relying on here. It was an observation as I understood it.

MISS STRICKLIN: And, the specific observations do stand though, right your Honor?

THE COURT: Yes. The objection's sustained.

Q. Then what did you observe, Officer Evensizer?

A. I observed this individual run back to the apartment and as I ran behind him he had grabbed the door handle, was able to open the door, threw the door open and as I ran down the hallway, he pushed the door back. I heard him, the individual as he was running in, indicate that it was the police. He didn't refer to me as being the police, but I don't know, I didn't know at that point who he was talking to, but he was warning the people inside that I was behind him and he went to close the door on me.

[p. 18] Q. Why did you run behind him?

A. Because I felt that he was going to run back to the apartment and warn everybody that the police were there.

Q. What went through your mind at the time he closed the door and you heard him say something to individuals inside?

A. That there was going to be the destruction of the evidence, the burning of marijuana and possibly the escape of the suspects inside.

Q. Why did you think that?

A. Again, based upon training and past experiences, has been classic observable behavior that has been brought forth in our lectures and training.

Q. What specific training and experience is it that tells you that that's the case?

A. It would be, again, as far as the general drug identification and enforcement and, the enforcement part in dealing with drug cultures. The basic generalities as far as the different type of drug abuse, whether it be methamphetamine, coke or crank versus somebody who is using the marijuana. One thing that we have been trained and is consistent is that it is very typical to try to destroy the evidence, either by throwing it out, flushing it or eating it.

Q. You can sit down, I'm sorry.

[p. 19] A. Thank you.

Q. Anything particular about this instance that made you believe that that was going to be the case or might be the case?

A. From everything that I'd testified to prior to the point that I ran up to the door, led me to believe that,

that, in fact, was going to be the case. That fact that the odor and the smoke was from marijuana that was currently being burnt. The fact that if it was just allowed to burn it would be destroyed, if it was flushed or swallowed or thrown out of a window that it would be destroyed.

Q. What belief did you have, if any, that there was any marijuana remaining in the room?

A. Because it was smoke from currently burning marijuana when he exited the room.

Q. When he re-entered the room was there any smoke at that time?

A. It was not the extent of when he originally opened the door. It was very – it was noticeable, but there was not a large puff of smoke nor was there this smoke that actually came out to the degree it was when he originally exited.

Q. When [sic] didn't you wait and get a search warrant?

A. Because I felt that by the time we pooled upon our resources and requested that, the evidence would have been [p. 20] destroyed.

Q. So, what did you do at that point?

A. I ran up to the door, I was able to put my hand out and catch the door as it hit the door frame. Instead of running immediately into the apartment, even though I heard the individual yelling and warning that the police were there, I identified myself as a police officer with Coeur d'Alene Police Department. And, at that point I

paused for a brief moment in the off chance that somebody may fire a weapon through the door and I was standing to the side of the door, paused for a moment, shoved the door open and then made entry into the apartment.

Q. And, was there anyone else present in that room besides Mr. Curl?

A. Yes, there were several other people in there.

Q. And, are any of those individuals present in the Courtroom today?

A. Yes.

Q. And, would you point them out?

A. It would be the young lady, Miss McCurdy, who is sitting next to Mr. Curl in the front bench directly behind the defendant's table.

MISS STRICKLIN: No further questions.

* * *

(2)

FILED
DEC 29 1993
OFFICE OF THE CLERK

No. 93-868

In The

Supreme Court of the United States

October Term, 1993

STATE OF IDAHO,

Petitioner,

vs.

JACKIE CARL CURL and KIMBERLY J. McCURDY,

Respondents.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents do not intend to respond to the Idaho Attorney General's Petition for Writ of Certiorari unless further ordered to do so by the Court.

TIM GRESBACK
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Counsel of Record

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Attorney for Respondents

Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

(3)

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8 pp

QUESTION PRESENTED FOR REVIEW

Whether the opinion of the Idaho Supreme Court, which held that the warrantless entry into a dwelling, for purposes of halting the destruction of evidence, violates the fourth amendment's prohibition against unreasonable searches unless the officer has a reasonable belief that the circumstances present a risk to a persons' safety, presents such an important question of federal constitutional law that certiorari should be granted?

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Welsh v. Wisconsin, 466 U.S. 740 (1984) 1, 2, 3

JURISDICTION AND RELATED MATTERS

Respondents agree with the Idaho Attorney General that jurisdiction is properly established for discretionary review. The Idaho Supreme Court relied upon no independent and adequate state ground, even though it has done so in other cases. *See, e.g., State v. Henderson,* 114 Idaho 293, 756 P.2d 1057 (1988) (roadblocks to stop drunk drivers violates Idaho constitution).

Similarly, respondents submit that the Idaho Attorney General has fairly and accurately captured the factual record below, and, has included in the petition the applicable constitutional and statutory provisions, as well as the pertinent lower court decisions.

REASONS FOR DENYING THE WRIT

In *Welsh v. Wisconsin,* 466 U.S. 740 (1984), the Court held an officer's warrantless entry into a home seeking to halt the destruction of evidence for a "relatively minor" crime could not overcome the presumption of unreasonableness under the fourth amendment. 466 U.S., at 750.

With *Welsh* as its backdrop, the Idaho Supreme Court held unanimously in this case that the presumption of unreasonableness was similarly unrebutted because the basis for the warrantless entry – to prevent the destruction of marijuana – did not involve a violent offense nor any other emergency involving violence. *State v. Curl,* Nos. 19499/19538, slip op. at 5 (Idaho September 1, 1993).

While the Idaho decision clearly marks violence as the constitutional demarcation line for permissible warrantless entries to prevent the destruction of evidence, the rule was not first articulated in Idaho. Rather, precedent is firmly rooted in prior opinions of the Court. For example, Justice Jackson stated in his concurring opinion in *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948):

> "It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve *no violence or threats of it.*" *Id.*, at 459, 69 S. Ct., at 195 (emphasis added).

Justice Jackson's analysis was quoted with approval in both *Welsh*, 466 U.S., at 751, 104 S. Ct., at 2098, and by the Idaho Supreme Court below, slip op. at 5-6.

Furthermore, various courts around the country have found the absence or presence of violence dispositive in examining whether exigent circumstances justify a warrantless entry. *See, e.g., Commonwealth v. Hamilton*, 24 Mass. 290, 293, 508 N.E.2d 870, 872-73 (1987); *Walls v. Commonwealth*, 2 Va. App. 639, 648, 347 S.E.2d 175, 180 (1986); *United States v. Killebrew*, 560 F.2d 729, 734 (6th Cir. 1977).

The Idaho Attorney General argues that because of the decision below,

> ". . . police officers in Idaho, unlike their brother and sister officers in other jurisdictions, will not be able to make warrantless entries to prevent the destruction of controlled substances, and evidence of most felonies, no matter how certain

> they may be that such destruction is taking place." Pet. for Cert. at 13-14.

Such a characterization is not altogether fair. For example, the sister state of Washington, under a *Welsh* analysis, forbids the warrantless entry into a dwelling to prevent the destruction of evidence for the crime of misdemeanor possession of marijuana. *State v. Ramirez*, 49 Wash. App. 814, 746 P.2d 344 (1987).

The California Supreme Court, in an analysis similar to the Idaho Supreme Court here, held that a warrantless entry into dwelling was not justified in a case involving the possession of stolen property because it was a "non violent crime evidencing no propensity for endangering life." *People v. Ramey*, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637, *cert. denied*, 429 U.S. 929 (1976). Thus, the Idaho Supreme Court's decision below is not out of step with neighboring jurisdictions in interpreting the fourth amendment.

This is not to say that the law on the warrantless entry into a home is precisely uniform throughout the country. Some states, in interpreting their own constitution, impose an absolute bar on warrantless residential arrests for misdemeanors. *See, e.g., State v. Guertin*, 190 Conn. 440, 461 A.2d 963, 970 (1983). Variations on the rights of the police in different states does not uncover some Constitutional shortcoming, but, instead, exposes the beauty of our federalism. *Welsh* set an excellent analytical framework for evaluating the warrantless entry into homes and this case establishes no need to rework it.

CONCLUSION

For the foregoing reasons, Respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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